

## ANNOUNCEMENT

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## NOTES

POWER OF A STATE TO PREFER LOCAL CREDITORS OF AN INSOLVENT AS TO PROPERTY WITHIN THE STATE—In the administration of the property of an insolvent the question presents itself as to how far a state in which property is located may discriminate in favor of creditors, solely because they are its citizens. The consideration of this problem will be approached from two points of view, first, as a pure problem of conflict of laws, and second, to determine to what extent the problem is controlled by the Constitution of the United States and *Bankruptcy Acts* passed in pursuance thereof.

### I. *A Problem in Conflict of Laws*

The laws of governments have no force beyond their territorial limits, and if applied in the courts of another state, it is upon a principle of comity, which ceases to operate if the law conflicts with the public policy of the second state.<sup>1</sup> It follows that receivers<sup>2</sup> appointed by one jurisdiction are not entitled as of right to recognition in other jurisdictions.<sup>3</sup> Yet an adjudication of insolvency is in effect an order

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<sup>1</sup> For an interesting application of this problem, where the Italian court threatened reprisals if the New Jersey court would not recognize its decrees see *Caruso v. Caruso*, 143 Atl. 771 (N. J. 1928); Beale, *Conflict of Laws* (1919) 33 HARV. L. REV. 1 and (1920) 34 HARV. L. REV. 50; KENT, *COMMENTARIES* (4th ed. 1860) 406; Lorenzen, *Territoriality, Public Policy and the Conflict of Laws* (1924) 33 YALE L. J. 736.

<sup>2</sup> The receiver is but an officer of the court, from which he derives his appointment, and his possession is the possession of the court for the benefit of whoever may be ultimately determined to be entitled to its possession. HIGH, *RECEIVERS* (4th ed. 1876) §§ 134, 139.

<sup>3</sup> *Atkins v. Wabash*, 29 Fed. 161 (C. C. N. D. Ill. 1886); *Irwin v. Granite Ass'n*, 56 N. J. Eq. 244, 38 Atl. 680 (1899); *Frowert v. Blank*, 205 Pa. 299, 54 Atl. 1000 (1903).

that the insolvent place all his property in the hands of an assignee for equal distribution among his creditors, and it would seem to be as much the duty of the tribunals of other states to lend their aid to carry out the design, as it would be to enforce any other just and legal foreign judgment or decree.<sup>4</sup>

The problem is well stated by Chief Justice Parker in *Darves v. Head*:<sup>5</sup> "What shall be done to avoid on the one hand the injustice of taking the whole fund for the use of our citizens, to the prejudice of foreigners when the estate is insolvent, and on the other, the equal injustice and greater inconvenience of compelling our own citizens to seek satisfaction of their debts in distant countries?"

According to the earlier English cases, a foreign assignee was recognized and all property turned over to him.<sup>6</sup> In *ex parte Blake*,<sup>7</sup> where it appeared that the American courts had not recognized an English assignment Lord Thurlow said, "I had no idea of any country refusing to take notice of the assignee under our laws"; and equally certain was Lord Robertson in *Selkirk v. Davies*,<sup>8</sup> declaring that in every country where the true principles of international law are understood, the assignee's title to all property would be recognized. The true test arises in cases where the insolvent has been adjudged bankrupt in two jurisdictions, or where it appears that creditors resident in the state where the insolvency proceedings are had, will be preferred to foreign creditors when all the assets are marshalled by the assignee. In *Stein's Case*,<sup>9</sup> Lord Fry considered three solutions. First, that every forum yield to that of the domicile. Second, that every forum yield to the first that adjudicates the debtor bankrupt. Third, that the forum administer assets locally situated, allowing all creditors, wherever resident, to prove but considering what had been paid in other jurisdictions to creditors proving in order to produce equality among all.

In the later case of *Grimshaw v. Galbraith*,<sup>10</sup> a foreign sequestration was not allowed to prevail over a mere garnishee order in England, while in *re Macfadyen*<sup>11</sup> an imperial statute vesting in the Indian trustee all the property of the bankrupt whether in India or elsewhere seems to have been entirely ignored.<sup>12</sup> The subject is so

<sup>4</sup> *People v. Granite State Provident Ass'ns*, 161 N. Y. 492, 55 N. E. 1053 (1900); *Perkins v. Clear Spring Co.*, 17 Phila. 168, 169 (Pa. 1886). Cf: *Booth v. Clark*, 17 How. 322, 328 (U. S. 1854) Wayne, J., "We think that a receiver could not be admitted to the comity extended to judgment creditors without an entire departure from chancery proceedings."

<sup>5</sup> 3 Pick. 128, 147 (Mass. 1825).

<sup>6</sup> 3 PIGGOTT, FOREIGN JUDGMENTS AND JURISDICTION (1910) 98.

<sup>7</sup> 1 Cox Eq. 398 (Eng. 1787).

<sup>8</sup> L. R. 15 Eq. 383 (1873).

<sup>9</sup> 1 Rose 462 (Eng. 1812).

<sup>10</sup> [1910] 1 K. B. 339.

<sup>11</sup> [1908] 1 K. B. 675.

<sup>12</sup> See BATY, PRIVATE INTERNATIONAL LAW (1914) 98.

little covered by decisions that the present English law in this respect cannot be stated with certainty.<sup>13</sup>

The great diversity of ideas prevailing in different countries makes the question of jurisdiction a difficult one. It has been suggested<sup>14</sup> that the assumption of jurisdiction by a foreign country ought to be recognized as long as it is not unreasonable, but for a court to waive its jurisdiction because a foreign court has already acquired jurisdiction of the matter requires great confidence in the law and procedure of that country.

In the United States the courts from the outset have usually refused to recognize foreign assignees, and it was early decided that personal property of an English bankrupt in the United States might be held by attachment to satisfy the claims of American creditors.<sup>15</sup> The chief reason for departing from the English doctrine was the hardship of compelling American creditors to go to England when such creditors, presumably, had extended credit to the bankrupt relying on his property in the United States.<sup>16</sup>

The doctrine thus established was adopted when similar questions arose between states, and it soon became well-established law, that for purposes of attachment, an assignment in insolvency under state laws had no extra-territorial effect, at least as against attachments made by citizens of the state in which the property was located.<sup>17</sup> If the attachment was made by a creditor from a state where the insolvency proceedings were had, or by a creditor from some other state, a distinction was made by most courts and such creditor was denied the rights which were accorded the citizens of the state where the property was situated.<sup>18</sup> It was customary, therefore, for the local courts to appoint an ancillary receiver for the protection of local creditors,<sup>19</sup> and on the whole, the state courts recognized each other's decrees except in so far as they contravened the policy of the *lex fori*. It seems, however, that every time local citizens were involved, a public

<sup>13</sup> LORENZEN, *CASES ON CONFLICT OF LAWS* (2d ed. 1924) 989.

<sup>14</sup> 3 PIGGOTT, *op. cit. supra* note 6, at 123.

<sup>15</sup> *Milne v. Morton*, 6 Binn. 353 (Pa. 1814).

<sup>16</sup> *Burk v. McClain*, 1 Harris and McHenry 236 (Md. 1766); *Taylor v. Geary*, 1 Kirby 313 (Conn. 1787); *Harrison v. Sterry*, 5 Cranch 289 (U. S. 1809).

<sup>17</sup> *Taylor v. Columbian Ins. Co.*, 14 Allen 354 (Mass. 1867); *in re Waite*, 99 N. Y. 433, 2 N. E. 440 (1885).

<sup>18</sup> *May v. First National Bank*, 122 Ill. 551, 13 N. E. 806 (1887); *Burlock v. Taylor*, 16 Pick. 335 (Mass. 1835); *Bagby v. Atlantic M. & O. R. R. Co.*, 86 Pa. 291 (1878); *contra: Paine v. Lester*, 44 Conn. 196 (1876); *Warner v. Jaffray*, 96 N. Y. 248 (1887). See *Bailey, An Assignment in Insolvency* (1893) 7 HARV. L. R. 281.

<sup>19</sup> *Ramsay v. Ramsay*, 97 Ill. App. 270 (1901); *in re Middleby*, 249 Pa. 203, 94 Atl. 820 (1915).

policy<sup>20</sup> was invoked requiring local assets to be administered at least to the extent of giving the local citizens a *pro rata* share of the total assets wherever situated.<sup>21</sup> In the earlier cases the constitutional problem, which will be discussed in the next section, was little considered.

The tendency, in modern times in this country, which can be gathered from local statutes,<sup>22</sup> is in line with a *pro rata* settlement basis. This trend is, of course, to be commended, for, in some measure, "it is yielding much not to appropriate local assets to the prior [complete] satisfaction of local creditors."<sup>23</sup> While in the absence of constitutional provisions or treaty stipulations a state may handle the property of a bankrupt within its jurisdiction as it desires,<sup>24</sup> this much would seem equitable and economically advisable, that this power ought not to be exercised to give local creditors any superior right in case the estate as a whole is insolvent. Such action by legislatures militates against that fundamental principle in the administration of insolvents' estates, that "equality is equity."<sup>25</sup>

## II. Constitutional and Statutory Limitations

In the final analysis, laws relating to insolvents' estates are not poor debtors' laws, but amount rather to a commercial regulation for the benefit of society in general.<sup>26</sup> It was to be expected therefore that since "commerce knows no state laws," the framers of the Constitution would see fit to grant "Congress . . . the power . . . to establish . . . uniform laws on the subject of bankruptcies throughout the United States."<sup>27</sup> When the paramount jurisdiction of Congress has been exercised in the enactment of a bankruptcy law, all state bankruptcy laws are suspended in so far as they relate to the same subject matter and affect the same persons as the federal bankruptcy laws.<sup>28</sup> Since Congress has extensively legislated in the mat-

<sup>20</sup> *Hunt v. Columbian Ins. Co.*, 55 Me. 290 (1869); *Bidlack v. Mason*, 26 N. J. Eq. 230 (1875).

<sup>21</sup> *Mitchell v. Cox*, 28 Ga. 32 (1859).

<sup>22</sup> 2 SCHOULER, WILLS, EXECUTORS AND ADMINISTRATORS (5th ed. 1915) § 1015 A.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Cf.*: *Matter of People (Norske Lloyd Ins. Co. Ltd.)*, 249 N. Y. 139, 163 N. E. 129 (1928).

<sup>25</sup> Olmstead, *The Development of the Bankruptcy Laws* (1924) 1 AM. BANKRUPTCY REV. 151. *Cf.*: *in re Johns*, [1928] 1 Ch. 737 in which the court refused to recognize an agreement, which, though it did not conflict with any provision of the Bankruptcy Act, in effect, was to work an inequality among creditors in case of bankruptcy.

<sup>26</sup> OLMSTEAD, *supra* note 25.

<sup>27</sup> U. S. CONSTITUTION, Art. I, Sec. 2.

<sup>28</sup> *International Shoe Co. v. Pinkus*, 49 Sup. Ct. 108 (1929). *Contra: in re Schultz*, 106 Fed. 834 (S. D. Iowa 1901).

ter,<sup>29</sup> bankruptcy is today commonly conceived of as a "federal system of jurisprudence created by the enactment of Congress by which a debtor's assets are recovered and taken into custody and by which an equitable distribution of these assets is made amongst the creditors on a *pro rata* basis,"<sup>30</sup> and by which, generally, a discharge of his debts is granted to the bankrupt.

There are, however, two important types of situations that are not governed by the federal *Bankruptcy Act* and are accordingly left to state supervision. When Congress was given power to make uniform laws on bankruptcy, the term "bankruptcy" carried a very definite connotation. The laws for the settlement of estates of deceased persons,<sup>31</sup> though they may provide for settling estates in the insolvent course, have not been regarded as general insolvent laws.<sup>32</sup> The *Bankruptcy Act* does not and has never attempted to govern decedents' estates.<sup>33</sup> It is very doubtful whether Congress under the constitutional authority vested in it, could ever extend jurisdiction to such cases.<sup>34</sup> Certain it is that this is a class of insolvency left at present, at least, to state control. The second situation arises because the federal act itself<sup>35</sup> provides that preference is to be given in federal bankruptcy courts to "Debts owing to any person who by the law of the state . . . is entitled to priority."<sup>36</sup>

It is instructive to consider what would be the possibility of preferences under state priority laws which provided "that *residents of this state* shall have a priority in the distribution of assets or subjection of the same or any part thereof to the payment of debts over all simple contract creditors being *residents of any other country or countries*,"<sup>37</sup> in the light of some of the more important sections of the Constitution apart from the restrictions of the federal Bankruptcy Act.

<sup>29</sup> 2 STAT. 19 (1800), repealed 2 STAT. 248 (1803); 5 STAT. 440 (1841), repealed 5 STAT. 614 (1843); 14 STAT. 517 (1867) repealed 20 STAT. 95 (1878); 30 STAT. 544 (1898), 11 U. S. C. (1928) § 1, amended 44 STAT. 666 (1926), 11 U. S. C. (1928) § 243.

<sup>30</sup> Duberstein, *Bankruptcy*, in ISSAC, *FACTS ABOUT BANKRUPTCY*, (1928) 256.

<sup>31</sup> The same would seem to apply to any other fiduciary relationship, such as guardian of an infant or of a lunatic. See argument of counsel in *Hawkins v. Learned*, 54 N. H. 333 (1874).

<sup>32</sup> *Hawkins v. Learned*, *supra* note 31.

<sup>33</sup> However death does not abate proceedings that are already begun. 30 STAT. 549 (1898), 11 U. S. C. (1928) § 26.

<sup>34</sup> In England since 1914, decedents' estates if insolvent are administered in bankruptcy courts. 4 & 5 GEO. 5 c. 59, § 130 (1914).

<sup>35</sup> § 64 (7), 30 STAT. 563 (1898), 11 U. S. C. (1928) § 104.

<sup>36</sup> Under this subsection a landlord's claim for arrears being entitled to priority under state law is recognized in the federal courts. *In re West Side Paper Co.*, 159 Fed. 241 (E. D. Pa. 1908). Likewise as to mechanics liens. *Hildreth Granite Co. v. Waterliet*, 161 N. Y. App. Div. 420, 146 N. Y. Supp. 449 (1914).

<sup>37</sup> Cf. TENN. ANN. CODE (Shannon, 1913) § 2552.

"Privileges and Immunities" Clause.<sup>38</sup> The courts have not undertaken to give any exact or comprehensive definition of the words "privileges and immunities." Referring to this clause in *Conner v. Elliot*,<sup>39</sup> Curtis, J., said that it would be more in accordance with the duty of a judicial tribunal to leave its meaning to be determined in each case, upon a view of the particular rights asserted and denied therein. In *Blake v. McClung*,<sup>40</sup> where the court ruled specifically on a Tennessee statute,<sup>41</sup> it was felt that preference to creditors of a bankrupt was such a privilege as the Constitution sought to secure for the citizens of all states alike so as not "to put a citizen of one state in a condition of alienage when he is within or removes to another state, or when asserting in another state the rights that commonly appertain to those who are part of the political community known as the People of the United States." And when the manifest purpose of the law was to give to all local creditors priority over all creditors residing out of that state, whether the latter were citizens or only residents of some other state or country, it would appear that the majority of the court was correct in finding that this amounted to a denial of equal protection to non-resident citizens.<sup>42</sup> And obviously the result is correct, even though the bankrupt is a foreign corporation, in the admission of which a state may impose such conditions as it chooses,<sup>43</sup> for as far

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<sup>38</sup> U. S. CONSTITUTION, Art. IV, Sec. 1 (1). "The citizens of each state shall be entitled to all privileges and immunities of the citizens of the several states." By Amendment XIV it is provided that "all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and the State wherein they reside."

<sup>39</sup> 18 How. 591, 593 (U. S. 1855).

<sup>40</sup> 172 U. S. 239 (1898) (Brewster and Fuller dissenting). For a further development of the meaning of "privileges and immunities," see *Ward v. Maryland*, 12 Wall. 418, 430 (U. S. 1870); *Slaughter House Cases*, 16 Wall. 36, 77 (U. S. 1872); *Cole v. Cunningham*, 133 U. S. 107, 113, 114, 10 Sup. Ct. 269 (1890). See also *Globe Bank v. Marting*, 236 U. S. 288, 35 Sup. Ct. 377 (1914) (construing a Kentucky statute).

<sup>41</sup> *Supra* note 37.

<sup>42</sup> The dissenting justices argue that since a state may require of a corporation that a specific fund be deposited with the state treasurer before admission, (as in case of insurance companies) to secure local policyholders, it may also require a general mortgage on all the assets within the state as like security. While this is true from the standpoint of the corporation, the real problem arises whether these provisions can affect citizens creditors when the assets of the corporation are to be distributed. It seems that there can be a difference in the treatment of citizens of different states when there is a reasonable relationship between such different treatments and the varying situations of the persons. To require a mortgage on all assets of a corporation (that may be scarcely subject to any state regulations) within a state, no matter how large the amount of the assets or how much out of proportion with the total business done in the state, is to disregard such reasonable relationship. The problem is somewhat analogous to security for costs in the case of non-resident citizens.

<sup>43</sup> *Pembina Mining Co. v. Penna.*, 125 U. S. 181, 189, 8 Sup. Ct. 737 (1888). The same applies to the so-called "Mass. common law trusts." *Hemphill v. Orloff*, 48 Sup. Ct. 577 (1928).

as the rights of citizen creditors of the corporation are concerned, a state may not do indirectly what it could not do directly.

Although it is generally considered that a state may deal with the property of a decedent as it sees fit so as to give preferences to local creditors in the case of decedents' estates which are, in fact, insolvent,<sup>44</sup> the writer ventures the opinion that the decision of *Blake v. McClung*<sup>45</sup> in respect to the rights of non-resident citizens in general insolvency cases should also apply to decedents' estates. In view of the fact that the privileges of citizens wherever resident, rest on a constitutional guarantee, it does not seem to be material that the property being distributed to creditors is from one source or another. While there are no decisions directly on point, the conclusion seems irresistible.

It is evident that an alien cannot invoke the protection of the "immunities" clause in the Constitution, and it is likewise well settled that a legal entity is not a "citizen" in the sense in which the term is used in the Fourth Article of the Constitution—so that it becomes necessary to investigate other provisions of the Constitution as they touch upon the general problem of priority established by the states in case of insolvency, in order to determine whether a state may prefer its citizens, in the distribution of the assets, to aliens and corporations.

"*Equal Protection*" Clause.<sup>46</sup> It is now well settled that corporations are persons within the meaning of this clause.<sup>47</sup> The inquiry then becomes as to when a "person" is within the state's jurisdiction. In *Blake v. McClung*<sup>48</sup> it is said "without attempting to state what is the full import of the words 'within its jurisdiction' it is safe to say that a corporation not created by the state nor doing business there under conditions that subjected it to process issuing from courts of the state is not, under the above clause of the Fourteenth Amendment, within the jurisdiction of that state." In a later case of *Herndon v. Chicago Railway Co.*<sup>49</sup> the court in holding that a foreign corporation came within the scope of the equal protection clause, said that "The corporation was within the state, complying with its laws and had acquired under the sanction of the state a large amount of property within its borders and thus had become a person within the meaning

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<sup>44</sup> Generally the statutes now in force do not so provide. ILL. REV. STAT. (Cahill, 1927) 60; 2 MASS. GEN. LAWS, (1921) 2171; PA. STAT. (West, 1920) § 8458; with which cf. *Kansas Ry. Co. v. Cutler*, 16 Kans. 568 (1876); KY. STAT. (Carroll, 1922) §3868.

<sup>45</sup> *Supra* note 40.

<sup>46</sup> U. S. CONSTITUTION, Amendment XIV, "no state shall deny to any person within its jurisdiction the equal protection of its laws.

<sup>47</sup> *Santa Clara County v. Pacific R. R. Co.*, 118 U. S. 394, 396, 6 Sup. Ct. 1132 (1885); *Covington Turnpike v. Sanford*, 164 U. S. 578, 592, 17 Sup. Ct. 193 (1896); *Quaker City Cab v. Penna.*, 287 Pa. 161, 134 Atl. 404 (1926). See (1928) 77 U. OF P. L. REV. 120.

<sup>48</sup> *Supra* note 40.

<sup>49</sup> 218 U. S. 135, 136, 30 Sup. Ct. 633 (1910). See also *Southern Ry. Co. v. Greene*, 216 U. S. 400, 413, 30 Sup. Ct. 387 (1910).

of the Constitution and entitled to its protection." It is suggested<sup>50</sup> that though nothing is said as to being subject to the jurisdiction of the courts of the state, the court meant to imply that the corporation "which had entered the state with the state's consent and had been allowed to acquire a large amount of property, had upon entering submitted itself to the jurisdiction of the courts."

Under the power of a state, generally thought of as the power to impose such conditions as it chooses before admitting within its limits foreign corporations, the seemingly paradoxical query ought to be raised as to whether the corporation may be within the jurisdiction for the purpose of service and still be required to be outside the jurisdiction for the purpose of the protection of the Fourteenth Amendment. In *Home Insurance Co. v. Morse*,<sup>51</sup> it was held, in connection with a related problem, that a statute, requiring a foreign corporation as a condition of being permitted to do business within the state to stipulate not to remove into the federal courts, suits brought against them in the courts of the state, was unconstitutional. As a general proposition, it would seem that a "state cannot constitutionally compel a foreign corporation as a condition of doing or continuing to do business in the state, to relinquish any rights secured by the Constitution of the United States."<sup>52</sup>

Although no definite test can be laid down as to when a "person" is within the jurisdiction, still it is certain that aliens and corporations not "within the jurisdiction" of the state cannot complain of the discrimination against them in the distribution of an insolvent's estate under the equal protection guarantee.

"*Deprivation of Property without Due Process*" Clause.<sup>53</sup> Foreign corporations and aliens cannot complain simply because their claims are subordinated to the claims of local creditors, unless they are being deprived of property. The right of property which the Amendment protects includes the right to use property for any lawful purpose or to acquire property by any lawful means.<sup>54</sup> The foreign corporation or alien is not being deprived of its claim, which it may pursue in that jurisdiction or any other where assets can be found. It is only denied the right to participate upon terms of equality with local creditors in the distribution of the property of another who has done

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<sup>50</sup> BURDICK, *AMERICAN CONSTITUTION* (1922) 277. In *Kentucky Finance Corp. v. Paramount*, 262 U. S. 544, 43 Sup. Ct. 636 (1922) (Holmes and Brandeis dissenting), it was held that a corporation which went into the state for the purpose of repossessing itself, by a permissible action in the court, of specific personal property unlawfully taken out of its possession elsewhere and fraudulently carried into that state, was within the jurisdiction for the purpose of the undertaking.

<sup>51</sup> 20 Wall. 445 (U. S. 1873). See *Ducat v. Chicago*, 10 Wall. 410, 415 (U. S. 1869); cf: *Chicot County v. Sherwood*, 148 U. S. 529, 13 Sup. Ct. 695 (1892).

<sup>52</sup> CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1927) 177.

<sup>53</sup> U. S. CONSTITUTION, Amendment XIV.

<sup>54</sup> BURDICK, *op. cit. supra* note 50, at 513.



business in the state, and this does not amount to a deprivation of its property.<sup>55</sup> Since there is not a deprivation of property, it becomes unnecessary to consider whether or not there has been "due process."

"*Impairment of Contracts*" Clause.<sup>56</sup> This clause of the Constitution is rarely involved in the consideration of the preferential creditor statutes. Obviously, it can only be invoked in a case where the claim in question arose from a contract made prior to the passage of the statute.<sup>57</sup> It is generally recognized that where a statute deals only with the legal remedy, if a reasonable remedy is left, the obligation of the contract has not been impaired; so that the regulation of priorities as between the creditors, if it leaves a reasonable remedy, is not an impairment of the obligation of contracts.<sup>58</sup> It would seem, however, that an arbitrary relegation of aliens and foreign corporations not within the jurisdiction of the state, to the end of the list of creditors that are to be paid, whereas residents having the same types of claims are given first preference is not leaving a reasonable remedy to the former class and hence is an impairment of contracts. As has been indicated, however, the cases in which the protection of this clause can be sought are necessarily few in number.

*Conclusions.* In the distribution of a decedent's estate, it appears that if the estate be insolvent, a state may prefer resident creditors to aliens and foreign corporations not within the jurisdiction, with the limited exception noted under "Impairment of Contracts." And the same is true in the case of bankrupt estates, despite the fact that the federal government was given the power to control bankruptcies with a view to establishing equality throughout the states, and these state-created priorities must be recognized in federal bankruptcy courts.

No sound economic justification can be given for a state law that would take advantage of the opportunity open to it in this field. Though in theory and legal contemplation each state is an independent sovereign, it must be recognized that in commercial intercourse the states are mutually dependent. It is provincialism of the narrowest order which motivates a state to pass a law that looks only to the monetary gain of its residents without regard to business conditions in general and without concern for the proper balancing of equities among creditors.

As far as preferences in decedents' estates are concerned, the remedy where required seems to lie in an enlightenment of the state legislatures. It should not be necessary to make a constitutional amendment for a restricted class of cases. In the case of bankruptcy, the effect of such laws as the Tennessee law<sup>59</sup> could be rendered

<sup>55</sup> *Blake v. McClung*, *supra* note 40.

<sup>56</sup> U. S. CONSTITUTION, Art. I, sec. 10 (1).

<sup>57</sup> *Abilene Bank v. Commissioner*, 228 U. S. 1, 33 Sup. Ct. 409 (1912).

<sup>58</sup> *Oskosh v. Oskosh*, 187 U. S. 437, 439, 23 Sup. Ct. 234 (1903).

<sup>59</sup> For concise and accurate analysis of the situations arising under the Tennessee law see Marr, *Bankruptcy Law Amendments* (1925-26) 2 AM. BANKRUPTCY REV. 41.

nugatory, and priority based on provincialism defeated, by an amendment to the present *Bankruptcy Act* providing that *priorities granted by state laws to its residents and domestic corporations over non-resident aliens and foreign corporations shall not be recognized.*<sup>60</sup>

The Constitution of the United States gives Congress the power to regulate bankruptcy. If Congress feels it necessary, in the interest of commercial regulations, to assume this power granted it by the states, then it must assume at the same time the responsibility of providing legislation which breaks down the artificial barriers of state lines. The amendment suggested will not only be founded on reasons of equity, but will rest squarely upon a proper appreciation that problems of economic policy are not local but national in scope.

J. F.

**SERVICE OF PROCESS ON FOREIGN CORPORATIONS**—It is convenient to divide the cases in this field into two categories: (1) those which involve the jurisdiction of state courts over foreign corporations; (2) those which involve the jurisdiction of federal courts under the diversity of citizenship clause, whether originally commenced in a federal court or removed from a state court. Within the first class, it is well further to distinguish between the cases which arose prior to the passage of the Fourteenth Amendment to the Constitution and the development of the meaning of the "due process" clause, and those which arose subsequently.

Prior to the development of the concept of "due process," the question of state court jurisdiction was essentially a problem in conflict of laws, except where the case involved the "full faith and credit" clause of the Constitution, in which instance, however, the courts usually applied the principles of conflict of laws.<sup>1</sup> The original rule was that a corporation had no legal existence and could not be sued outside the state of incorporation.<sup>2</sup> This rule was found to be highly unsatisfactory because corporations in fact did business in foreign states, and it was inconvenient under such circumstances not to be able to sue them where they were doing business. Accordingly, most states passed statutes providing for service on foreign corporations under certain circumstances.<sup>3</sup> The validity of such statutes,

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<sup>60</sup> For general consideration of section, see 11 U. S. C. A. (1927) §104.

<sup>1</sup> *Lafayette Ins. Co. v. French*, 18 How. 404 (U. S. 1855); *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354 (1882).

<sup>2</sup> See the famous dictum of Taney, C. J., in *Bank of Augusta v. Earle*, 13 Pet. 519 (U. S. 1839). The reason for this attitude is evident when it is remembered that the law of private corporations was an outgrowth of the law of municipal corporations.

<sup>3</sup> See BEALE, *FOREIGN CORPORATIONS* (1904) 185, for the various statutory regulations. The most common type of statute forbids the doing of business in the state before the filing of a written consent to the jurisdiction of the courts, together with a designation of persons on whom process may be served.

within the state enacting them, could not be contested. But their validity was often sustained also under the "full faith and credit" clause, on the theory that since the state had the power absolutely to exclude foreign corporations, except those engaged in interstate commerce,<sup>4</sup> it might make any provisions for service of process as conditions to entrance, subject to the doctrine of unconstitutional conditions.<sup>5</sup> Such a view was clearly a reversal of the older view that the corporation could have no existence outside the state of incorporation. However, this theory was not completely satisfactory since it failed to cover the case where service was upheld when the corporation had not complied with the statute, but was actually doing business in the state, or where the statute itself required no consent. Therefore, the further theory has slowly evolved that since corporations are in fact groups capable of being present at more than one place at the same time, they are actually present in, and therefore subject to the jurisdiction of, the states in which they are doing business.<sup>6</sup>

After the development of the "due process" clause, a new element was introduced into the problem, namely, that in order to be constitutionally valid the basis of state jurisdiction must be reasonable.<sup>7</sup> Since that time two elements, then, are involved in the state decisions, first, whether the facts on which jurisdiction rests meet certain basic requirements of the Fourteenth Amendment, and second, whether the state statute imposes still further requirements for valid jurisdiction. Of course, on appeal from a state court to the United States Supreme Court, the sole question is one of "due process."

Where the case arises in the federal courts, or is there removed on the basis of diversity of citizenship, the question is one of federal jurisdiction and not state jurisdiction. Therefore, the federal court may have jurisdiction even though the requirements of the statute in the state from which the case has been removed have not been complied with.<sup>8</sup> The federal statutes conferring jurisdiction on the lower

<sup>4</sup> *Paul v. Virginia*, 8 Wall. 168 (U. S. 1868). This exception must be qualified today. See *International Harvester Co. v. Ky.*, 234 U. S. 579, 34 Sup. Ct. 944 (1914).

<sup>5</sup> See Merrill, *Unconstitutional Conditions* (1929) 77 U. OF PA. L. REV. 879.

<sup>6</sup> *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526 (1897); *Moulin v. Trenton Ins. Co.*, 24 N. J. L. 222 (1853); see HENDERSON, *THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW* (1918) 77 *et seq.* The English cases also base jurisdiction upon "presence." *Newby v. Van Oppen*, L. R. 7 Q. B. 293 (1872); *Logan v. Bank* [1904] 2 K. B. 495.

<sup>7</sup> *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559 (1895); *Riverside Mills v. Menefee*, 237 U. S. 189, 35 Sup. Ct. 579 (1915). Cf. *Kane v. N. J.*, 242 U. S. 160, 37 Sup. Ct. 30 (1916); *Hess v. Pawloski*, 274 U. S. 93, 47 Sup. Ct. 632 (1927) (non-resident motorist cases).

<sup>8</sup> *Chatters v. Louisville R. R.*, 17 F. (2d) 305 (E. D. La. 1926). "If actions are started and removed into this court the sufficiency of the service under the state law is still to be tested by the necessities required to give jurisdiction in an action instituted at the outset in the federal court. *Goldey v. Morning News* (N. Y. 1895) 156 U. S. 518, 522, 15 S. Ct. 559. . . ." *Vitkus v. Clyde Steamship Co.*, 232 Fed. 288, 289 (D. C. N. Y. 1916). See 28 U. S. C. § 81, pp. 657, 658 (1927).

federal courts in general terms allow suits against foreign corporations only at the residence of the plaintiff in cases depending solely on diversity of citizenship.<sup>9</sup> This allows the conferred jurisdiction of the federal courts to rest largely on general principles of conflict of laws subject only to the requirement of the Fifth Amendment of the United States Constitution that the assumption of jurisdiction be not such as to violate the "due process" clause. From this analysis, it seems that it may safely be said that the question whether a federal court has jurisdiction in this type of case turns solely on the question whether the foreign corporation has been reasonably served.<sup>10</sup>

How, then, has "due process" been defined in this field, or, to rephrase the problem, what are the facts on which jurisdiction may reasonably be predicated? If the corporation actually consents to any type of service, it would seem that jurisdiction may be acquired by such service, at least to the same extent that jurisdiction over a private individual may be acquired by his consent.<sup>11</sup> On the other hand, if it does not consent, the courts have generally held that there are two requisites to reasonable service. First, the corporation must be doing business in the state.<sup>12</sup> What constitutes the doing of business is a complicated question of fact which the Supreme Court has refused to answer generally, preferring to decide each case on its own facts.<sup>13</sup> Second, it is essential that service be made upon an agent of the corporation who is sufficiently representative in character "that the law would imply, from his appointment and authority, the power to receive service of process."<sup>14</sup> Statutes which designate some state officer are constitutional if at the same time there is imposed upon him the offi-

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The mere fact of removal to the federal court by a defendant corporation does not constitute a general appearance so as to cure defective service of process in the state court. See cases cited, 28 U. S. C. § 81 (24) (1927).

However, such defective service in the state court can be cured by new service of process in the federal court, after removal. 41 STAT. 554 (1920), 28 U. S. C. § 83 (1927).

<sup>9</sup> 36 STAT. 1101 (1911), 28 U. S. C. § 112 (1926). *Ex parte Schollenberger*, 96 U. S. 369 (1877); *Barrow Steamship Co. v. Kane*, *supra* note 6. However, jurisdiction of the federal courts over foreign corporations in patent infringement cases is limited to the courts of the district where the infringement was committed and where the corporation has a regular and established place of business. 36 STAT. 1100 (1911), 28 U. S. C. § 109 (1926).

<sup>10</sup> *Farmers' and Merchants' Bank v. Fed. Reserve Bank*, 286 Fed. 566 (E. D. Ky. 1922). The Conformity Act (17 STAT. 197 (1872), 28 U. S. C. § 724 (1926)), though it has no bearing on the question of jurisdiction, and though it does not bind federal courts to follow state practice as to service of process, has generally induced a choice to follow that practice.

<sup>11</sup> *Penna. Fire Ins. Co. v. Mining Co.*, 243 U. S. 93, 37 Sup. Ct. 344 (1917); *Smolik v. Phila. Coal Co.*, 227 Fed. 148 (S. D. N. Y. 1915); *Bangon v. Phila. Coal Co.*, 217 N. Y. 432, 111 N. E. 1075 (1916).

<sup>12</sup> *St. Clair v. Cox*, *supra* note 1; *Goldey v. Morning News*, *supra* note 7.

<sup>13</sup> See *St. Louis Ry. v. Alexander*, 227 U. S. 218, 33 Sup. Ct. 245 (1913).

<sup>14</sup> *Conn. Mutual Life Ins. Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308 (1899); *Commercial Accident Co. v. Davis*, 213 U. S. 245, 29 Sup. Ct. 445 (1909); *St. Louis Ry. v. Alexander*, *supra* note 13.

cial duty to notify the corporation.<sup>15</sup> It has been suggested that these two elements are not separate, but interrelated.<sup>16</sup> The problem is analogous to service on a private individual. For personal jurisdiction, he must be present within the state and service must be made on him in such manner that it is reasonably likely to come to his attention.

There are further limitations in respect of the causes of action which may properly be litigated under the service statutes without violating the "due process" clause. Any cause of action arising out of business done within the state may be sued upon.<sup>17</sup> Where the cause of action has arisen out of business done outside the state, it may be sued upon, provided the corporation has given actual consent.<sup>18</sup> In the absence of such actual consent, it has been held that service on a state official according to the service statute, in a suit involving a cause of action arising outside the state, is denial of "due process," the Supreme Court being of the opinion that the corporation would be subjected to a hardship if it were obliged to defend all causes of action in whatever state it may happen to be doing business.<sup>19</sup> It may well be argued, however, that this hardship is wholly imaginary and that the true test of "due process" is whether the corporation is likely to receive adequate notice. The Supreme Court has not yet ruled on the question whether or not jurisdiction could be had in the last situation by serving an actual agent of the non-consenting corporation rather than a state official.<sup>20</sup> If the hardship test be adhered to, that fact variation warrants no difference in result; on the other hand, the notice test, if that be adopted, would, as a practical matter be satisfied.

A recent case, *Zendle v. Garfield Aniline Works, Inc.*,<sup>21</sup> held that the retirement of the corporation from the state and the revocation of its designation of process agents are ineffectual to defeat jurisdiction over it, in actions upon causes of action arising within the state out of business done there. Such is the great weight of authority.<sup>22</sup> But

<sup>15</sup> *Mutual Reserve Fund Life Ass'n v. Phelps*, 190 U. S. 147, 23 Sup. Ct. 707 (1903). Statutes failing to impose such a duty were held bad under the "due process" clause in *King Tonopah Mining Co. v. Lynch*, 232 Fed. 485 (Nev. 1916), and in *Knapp v. Bullock Tractor Co.*, 242 Fed. 543 (S. D. Cal. 1917).

<sup>16</sup> *Farmers' and Merchants' Bank v. Fed. Reserve Bank*, *supra* note 10.

<sup>17</sup> *Old Wayne Life Ass'n v. McDonough*, 204 U. S. 8, 27 Sup. Ct. 236 (1907); *Simon v. Southern R. R.*, 236 U. S. 115, 35 Sup. Ct. 255 (1915). Upon the difficult matter of determining whether or not a cause of action has arisen out of business done within the state, see Osborne, "Arising out of Business Done in the State" (1923) 7 MINN. L. REV. 380.

<sup>18</sup> Cases *supra* note 11.

<sup>19</sup> *Simon v. Southern R. R.*, *supra* note 17.

<sup>20</sup> *Fry v. Denver*, 226 Fed. 893 (N. D. Cal. 1915) (service set aside). Contra: *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915 (1917). See generally, Fead, *Jurisdiction over Foreign Corporations* (1926) MICH. L. REV. 633.

<sup>21</sup> 29 F. (2d) 415 (N. J. 1928).

<sup>22</sup> *Mutual Reserve Fund Life Ass'n v. Phelps*, *supra* note 13; *American Ry. Express Co. v. Royster Guane Co.*, 273 U. S. 274, 47 Sup. Ct. 355 (1927); *Hill*

the rule has been strictly limited to deny its availability to those persons who are not within the class for whose benefit the statute was enacted, namely, residents who dealt with the corporation when it did local business.<sup>23</sup> The immediate practical reason for this development of the law is that the statutory remedy against foreign corporations would be illusory if the corporation were at liberty to incur heavy obligations in the state and then to retire with impunity. There is clearly no objection under the "due process" clause in cases where the corporation has actually consented, as in the *Zendle* case, by way of a written designation of agency; an agency is irrevocable in cases where it is founded on a contract with the state, made upon consideration that the corporation should have the privilege of carrying on business, and entered into for the benefit of persons suing on causes of action arising out of such business.<sup>24</sup> It appears to make no difference that the extension of authority to receive service after retirement is not express and must be implied from such words as "in any action."<sup>25</sup> But if there is no consent and jurisdiction rests on presence, removal necessarily precludes valid service.<sup>26</sup> There is some difference of opinion whether jurisdiction continues after retirement when the consent extended only to corporate agents and does not include some public officer.<sup>27</sup> In view of the purpose of the statutes and the probable tendency to enlarge their scope of operation, jurisdiction should survive removal in this case, too; moreover, it is fair that the corporation sustain all the burdens incident to its own act tending to prejudice the rights of creditors, including the burden of the possibility of non-notification because of the intervening discharge of the corporate agent.

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v. *Empire Co.*, 156 Fed. 797 (C. C. Idaho 1907); *Groel v. United Electric Co.*, 69 N. J. Eq. 397, 60 Atl. 822 (1905); *Kraus v. American Tobacco Co.*, 283 Pa. 146, 129 Atl. 60 (1925). On the other hand, two states have statutes which have been construed to mean that retirement and revocation are effectual to avoid service in all causes of action. *Peoples Tobacco Co. v. Am. Tobacco Co.*, 246 U. S. 83, 38 Sup. Ct. 233 (1918) (La.); *United Power Co. v. Bridge Co.*, 44 Mont. 343, 119 Pac. 796 (1911). See Note (1926) 45 A. L. R. 1447.

<sup>23</sup> *Hunter v. Mutual Reserve Life Ins. Co.*, 218 U. S. 573, 31 Sup. Ct. 127 (1910); *Chipman, Ltd. v. Jeffery Co.*, 251 U. S. 373, 40 Sup. Ct. 172 (1920).

<sup>24</sup> *Collier v. Mutual Reserve Fund Life Ass'n*, 119 Fed. 617, 618 (C. C. W. D. Ark. 1902); *Moore v. Mutual Reserve*, 129 N. C. 31, 33, 39 S. E. 637, 638 (1901). Some cases go further by finding implied terms in the contract between the corporation and the party seeking a remedy.

<sup>25</sup> *Mutual Reserve v. Phelps*, *supra* note 15, the leading Supreme Court case, construed the statute in this fashion. Earlier federal cases refused to imply an extension to suits after retirement. *Swann v. Mutual Reserve*, 100 Fed. 922 (Ky. 1900); *Lathrop Co. v. Construction Co.*, 150 Fed. 666 (W. D. N. Y. 1907), *rev'd* on other ground, 215 U. S. 246, 30 Sup. Ct. 76 (1909).

<sup>26</sup> *Conley v. Matheson Alkali Works*, 190 U. S. 406, 23 Sup. Ct. 728 (1903).

<sup>27</sup> *Kirber-Bender Fire Escape Co. v. Chicago Beach Hotel*, 116 Fed. 359 (C. C. A. 7th, 1902) (agency held terminated). *Contra: Brown-Ketcham Iron Works v. Swift Co.*, 53 Ind. App. 630, 100 N. E. 584 (1913).

THE PENNSYLVANIA CASE OF MARKET ST. TITLE & TR. CO. v. CHELTEN TR. CO.—A PROBLEM IN BILLS AND NOTES—In the recent Pennsylvania case of *Market Street Title & Trust Co. v. Cheltenham Trust Co.*,<sup>1</sup> the plaintiff bank drew a check on itself, which was supposed to be made payable to A. W. Sanson. By mistake the check was made payable to S. W. Samson, who was non-existent. By a further mistake it was directed and mailed to A. W. Sampson. An alteration changed the name of the payee to read A. W. Sampson.<sup>2</sup> The defendant bank, noticing the alteration, took merely for collection the check generally indorsed "A. W. Sampson." The defendant thereupon indorsed the check "Pay to any bank or banker. Prior endorsements guaranteed," and sent it to the plaintiff who paid the amount thereof to the defendant, whose credit to Sampson was thereafter drawn upon in full by the latter. The plaintiff discovered, fifty-two days after making payment, that the check had been originally misdirected, and notified the defendant, who refused to make restitution. The court denied recovery.

It is clear that this case does not fall within the category of "fictitious payee" cases. Where the payee is non-existent or fictitious, whether the instrument is payable to bearer is determined by the state of mind and the intent of the drawer.<sup>3</sup> If to the knowledge of the drawer the person named as payee was non-existent, or if the drawer did not contemplate that the existing person by that name should have title, then, in view of his knowledge that there could be no indorsement by the person named, he is held to intend that title to the instrument should pass by delivery.<sup>4</sup> However, in this case the drawer believed that the person named as payee was an existing person, and intended that title should pass to such existing person. The instrument was therefore not payable to bearer and title could not pass by mere delivery.

A more serious problem is whether the principle of the "impostor" cases can be extended to cover the principal case, so that the sendee of the check may be said to have acquired title thereto. In the typical "impostor" situation, the impostor, by fraudulently impersonating another, induces the drawer of a check to make it payable to himself in the name of the person impersonated, and to deliver it to

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<sup>1</sup> Supreme Court of Pennsylvania, decided March 18th, 1929.

<sup>2</sup> The majority opinion as filed considers that the alteration changed the name of the payee from S. W. Samson to A. W. Sampson. The dissenting opinion considers the name as altered to be A. W. Sanson. An investigation of the paper books filed by counsel, and of the court record, shows that the dissenting opinion is correct as to the fact.

<sup>3</sup> NEGOTIABLE INSTRUMENTS LAW § 9 (3); *Montgomery Garage Co. v. Manufacturers' Liability Insurance Co.*, 94 N. J. L. 152, 109 Atl. 296 (1920); *Armstrong v. National Bank*, 46 Oh. St. 512, 22 N. E. 866 (1889); *United Cigar Stores v. American Raw Silk Co.*, 184 App. Div. 217, 171 N. Y. Supp. 480 (1918), *aff'd*, 229 N. Y. 532, 129 N. E. 904 (1920).

<sup>4</sup> BRANNAN, NEGOTIABLE INSTRUMENTS LAW (Chafee's ed. 1926) 98.

himself. The great weight of authority holds that in such a case title passes to the impostor,<sup>6</sup> and that a holder in due course who takes from the impostor may recover on the instrument against the drawee. The drawer intended to make the check payable to the person before him, even though he was mistaken as to the identity of that person.<sup>7</sup> No distinction has been made in the majority of cases between a manual delivery of the check by the drawer to the impostor and a delivery to him by mail, after he has induced in the mind of the drawer the belief that he is the person entitled to the money.<sup>7</sup> The refusal to make a distinction between the two cases seems reasonable. In the latter situation, just as in the former, the mind of the drawer goes out to the person to whom he mails it, so that he intends the sendee to have title, even though he is mistaken as to the sendee's identity.

It has often been said that the drawer in the "impostor" cases has a double intent; that he intends, in the first place, to make the check payable to the person before him, or at the other end of the line of correspondence, and secondly, to make the check payable to the person whose name appears thereon as payee;<sup>8</sup> and that the first intent governs the passage of title because it is the "controlling" intent.<sup>9</sup> Such an analysis, it would seem, is unnecessarily complicated. There exists but a single intent—to make the check payable to the person before the drawer, or, in the mailing case, to the person to whom the check is sent. The other so-called intent is merely the motive of the drawer, that is to say, the drawer intends to give and does give the check to the impostor because he believes that the impostor is the person entitled to it. The mere fact that he is mistaken in this belief should not prevent the fulfillment of his intent, the passage of title to the impostor.

The principal case presents a fundamentally different situation. In the "face to face" cases there can be no doubt that the drawer's mind goes out to the person before him so that he intends that person to be payee. Similarly, in the "mail" cases, we can find that the drawer's mind went out to the person who had previously by correspondence or telephone conversation been established in the drawer's mind as the person entitled to the instrument. However, in the principal case

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<sup>6</sup> *Land Title & Trust Co. v. Northwestern Trust Co.*, 196 Pa. 230, 46 Atl. 420 (1900), *aff'd* 211 Pa. 211, 60 Atl. 723 (1905); *Meridian Nat. Bank v. First Nat. Bank*, 7 Ind. App. 322, 33 N. E. 247 (1893); *U. S. v. Nat. Exchange Bank*, 45 Fed. 163 (C. C. E. D. Wis. 1891); *Robertson v. Coleman*, 141 Mass. 231, 4 N. E. 619 (1886).

<sup>7</sup> *Land Title & Trust Co. v. Northwestern Trust Co.*, *Robertson v. Coleman*, both *supra* note 5.

<sup>8</sup> *Emporia Nat. Bank v. Shotwell*, 35 Kan. 360, 11 Pac. 141 (1886); *Clark v. Maloney*, 6 Kan. 82 (1870). *Contra*: *Palm v. Watt*, 7 Hun 317 (N. Y. 1876).

<sup>9</sup> *BRANNAN*, *op. cit. supra* note 4 at 208.

<sup>10</sup> *BRANNAN*, *loc. cit. supra* note 8.



there is no evidence at all to justify a finding that the drawer was ever even made aware of the existence of Sampson.<sup>10</sup> But the court decided that there was an intent to make Sampson the payee and that Sampson did get title to the check. It seems unfortunate that the court should fail to distinguish this case from the ordinary "impostor" case.

However even if it be conceded that Sampson had title, it would seem that he did not, by his indorsement, pass title to the defendant, because of the variance between the name of the payee and that in the indorsement. It has been held that the spelling of the payee's name and the spelling of the name in the indorsement must correspond exactly in order that title may be passed to the indorsee.<sup>11</sup> It has been suggested that this holding has been superseded by the *Negotiable Instruments Law*,<sup>12</sup> but such a suggestion seems unwarranted. The *Negotiable Instruments Law* provides that, "where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he think fit, his proper signature."<sup>13</sup> There seems to be nothing in this section which provides that he may indorse by writing his correct name alone; and in the absence of such a provision, it seems reasonable to construe the words "may indorse the instrument as therein described" to mean "must indorse the instrument as therein described."

The effect of the alteration is clear. An unauthorized alteration in a material part of an instrument renders the instrument void, except in the hands of a holder in due course.<sup>14</sup> It is well settled that an alteration of the name of the payee is a material alteration.<sup>15</sup> The defendant, because it admittedly had notice of the defect in the instrument, was not a holder in due course, and the instrument was therefore void in its hands.<sup>16</sup> It is evident, therefore, that the defendant could not have recovered on the instrument had it sued the plaintiff, the

<sup>10</sup> See *Slattery & Co. v. Nat. City Bank*, 114 Misc. 48, 186 N. Y. Supp. 679 (1920), where a check meant to be sent to a party in Oklahoma was sent by mistake to a party of the same name in Texas, and the court held that the person to whom the check was sent could recover thereon. The decision is criticized in (1921) 21 COL. L. REV. 576, and in *BRANNAN op. cit. supra* note 4.

<sup>11</sup> *Bolles v. Stearns*, 11 Cush. 320 (Mass. 1853). Here a bill was made payable to John P. Reed, and delivered to Joseph P. Reed, and indorsed Joseph P. Reed. It was held that no title passed by such indorsement. The court considered that John P. Reed was the payee, and that the indorsement of any other name was not the indorsement of the payee. It is more correct to say that though Joseph P. Reed was the payee, he was payee in the name of John P. Reed, and could pass title to the instrument only by an indorsement in such name.

<sup>12</sup> *BRANNAN*, *op. cit. supra* note 4, at 82.

<sup>13</sup> *NEGOTIABLE INSTRUMENTS LAW*, § 43.

<sup>14</sup> *NEGOTIABLE INSTRUMENTS LAW*, § 124; *Diamond Distilleries Co. v. Gott*, 137 Ky. 585, 126 S. W. 131 (1910).

<sup>15</sup> *NEGOTIABLE INSTRUMENTS LAW*, § 125-4; *Hoffman v. Planter's Bank*, 99 Va. 480, 39 S. E. 134 (1901); *Union Tool Co. v. Farmers' & Merchants' Nat. Bank*, 192 Cal. 40, 218 Pac. 424 (1923).

<sup>16</sup> *NEGOTIABLE INSTRUMENTS LAW*, § 52-4.

drawee. But, the money having been paid, it is necessary to ascertain whether there is any theory upon which the plaintiff is entitled to recover it.

In granting recovery to the drawee of an instrument on which there has been an alteration, or a forged indorsement, the courts have been confused as to the basis of such recovery. It has been held in many cases that the indorsement on the check was an implied warranty of the genuineness of the entire instrument, for breach of which the drawee could recover.<sup>17</sup> However, an implied warranty is inseparably connected with a sale; and this theory of recovery seems unsound, since whatever warranty is created by the indorsement extends only to a subsequent holder<sup>18</sup> and the drawee is not in that position. Presentment for payment, and payment by the drawee, do not constitute a negotiation or sale of the instrument,<sup>19</sup> so that, on principle, it would seem unsound to find a warranty running to the drawee. The indorsement by one who receives payment is merely a receipt for such payment,<sup>20</sup> and is not a guarantee to the drawee of the genuineness of the instrument.

It has been held, however, that if the person receiving payment expressly guarantees the genuineness of prior indorsements—which guarantee has the effect of guaranteeing the genuineness of the entire instrument,<sup>21</sup> with the exception of the drawer's signature—a contract of guarantee is thereby created which runs to the drawee.<sup>22</sup> Such a situation is presented in the instant case.

It is doubtful if it is any more correct to find that the holder of paper may be liable on an express warranty than on an implied warranty to the drawee. The very nature of a warranty seems to attach it inseparably to a sale of the instrument, and the mere addition of express words of guarantee to the signature of the indorsement, which changes the warranty from implied to express, would not seem to invest the acts of presentment for payment and subsequent payment with the qualities of a negotiation or sale. However, if it be con-

<sup>17</sup> *Interstate Trust Co. v. U. S. Nat. Bank*, 67 Colo. 6, 185 Pac. 260 (1919); *Central Nat. Bank v. North River Nat. Bank*, 44 Hun 115 (N. Y. 1887); *Peoples' Bank v. Franklin Bank*, 88 Tenn. 299, 12 S. W. 716 (1889); BRADY, *LAW OF FORGED AND ALTERED CHECKS* (1925) § 89; (1929) 42 HARV. L. REV. 411.

<sup>18</sup> NEGOTIABLE INSTRUMENTS LAW, §§ 65-66.

<sup>19</sup> *Nat. Bank of Commerce v. Farmers' & Merchants' Nat. Bank*, 87 Neb. 841, 128 N. W. 522 (1910); WOODWARD, *QUASI-CONTRACTS* (1913) § 80; Ames, *The Doctrine of Price v. Neal* (1891) 4 HARV. L. REV. 297, 302.

<sup>20</sup> WOODWARD, *loc. cit. supra* note 19; Ames, *supra* note 19.

<sup>21</sup> *Second Nat. Bank v. Guarantee Trust Co.*, 206 Pa. 616, 56 Atl. 72 (1903); *New York Produce Exchange Bank v. Twelfth Ward Bank*, 135 App. Div. 52, 119 N. Y. Supp. 988 (1909).

<sup>22</sup> *New York Produce Exchange Bank v. Twelfth Ward Bank*; see *Second Nat. Bank v. Guarantee Trust Co.*, both *supra* note 21. The view is adopted in (1929) 42 HARV. L. REV. 411. The New York case, the only one found directly in point by the writer, relies on earlier New York cases which are not in point.

ceded that the drawee may recover on an express warranty by the holder, yet it must be found that the holder intended to be bound on such a contract. It would seem that, in the instant case, there was no such intent, in view of the fact that the check was indorsed in the usual course of business, and that the stamp including the words of express warranty was in all probability applied indiscriminately to checks, whether they were intended to be subsequently negotiated, or presented for payment. There could be no reason for such a warranty by the defendant bank, since it definitely doubted the validity of the check; and it would seem incongruous to hold that the defendant guaranteed the genuineness of the instrument to the very person from whom it was to determine whether or not the check was genuine.

Recovery by a drawee who has paid on a forged or altered instrument is more accurately based on the quasi-contractual right to have money returned which has been paid under an honest mistake of fact.<sup>23</sup> It has been held in such a case that the drawee can recover regardless of any negligence on his part in paying.<sup>24</sup> However, a change of position by the holder, in reliance on the payment, is a complete defense against the action,<sup>25</sup> unless the holder has himself been guilty of negligence, and that negligence was the sole cause of the loss.<sup>26</sup> However, where both the holder and the drawee have been negligent, even though the holder's negligence was not the sole cause of the loss, some courts have permitted recovery by the drawee.<sup>27</sup> The better view seems to be that recovery should be denied, and that the loss should remain where it has fallen.<sup>28</sup>

The instant case seems to come within the latter class. Though the defendant changed its position in reliance on the payment by the plaintiff, its negligence in not ascertaining the facts concerning the check would have precluded the defense of change of position, had not the plaintiff been negligent in not detecting the alteration when the check was presented for payment. It has been held, where the drawer

<sup>23</sup> *Espy v. Cincinnati*, 18 Wall. 604 (U. S. 1873); *Redington v. Woods*, 45 Cal. 406 (1873); *Clews v. New York Banking Assn.*, 89 N. Y. 418 (1882); *Woodward*, *loc. cit. supra* note 19.

<sup>24</sup> *Kelly v. Solari*, 9 M. & W. 54 (1841); *Lewellen v. Garrett*, 58 Ind. 442 (1877); *Appleton Bank v. McGilvray*, 4 Gray 518 (Mass. 1855); *Woodward*, *op. cit. supra* note 19, § 15.

<sup>25</sup> *Continental Nat. Bank v. Tradesmen's Bank*, 173 N. Y. 272, 65 N. E. 1108 (1903); *Woodward*, *op. cit. supra* note 19, § 25.

<sup>26</sup> *Union Bank v. U. S. Bank*, 3 Mass. 74 (1807); *Phetteplace v. Buckdin*, 18 R. I. 297, 27 Atl. 211 (1893); *Koontz v. Central Nat. Bank*, 51 Mo. 275 (1873). The decision in the latter case was not rested on the negligence of the defendant.

<sup>27</sup> *Koontz v. Central Nat. Bank*, *supra* note 26, in which both parties appeared to have been negligent, although the defendant was probably more negligent than the plaintiff; *Corn Exchange Bank v. Nassau Bank*, 91 N. Y. 74 (1883); *Bank of Toronto v. Hamilton*, 28 Ont. 51 (1898). *Contra*: *Crocker-Woolworth Bank v. Nevada Bank*, 139 Cal. 564, 73 Pac. 456 (1903); *Hathaway v. County of Delaware*, 185 N. Y. 368, 78 N. E. 153 (1906).

<sup>28</sup> *Woodward*, *op. cit. supra* note 19, § 25.

and the drawee of an instrument are the same party, that he is bound to know all the facts concerning the instrument, and that no recovery can be had from the holder after payment has been made, if it is later discovered that the instrument was altered or forged.<sup>29</sup> It seems entirely reasonable to hold the party to this knowledge; there is no one who is better able to know the true facts than the party who both drew and paid the check, and the "vocational" duty imposed on the bank in such case is consonant with the higher degree of care ordinarily required of banks. The refusal of recovery to the plaintiff in the principal case accords with the better view that it is unconscionable to shift the loss when both parties are at fault.

R. P. M.

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<sup>29</sup> U. S. v. Nat. Exchange Bank of Baltimore, 1 F. (2d) 888 (C. C. A. 4th, 1924); BRADY, *op. cit. supra* note 17, § 86.